

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

77-6047

-----:
KENNETH KOE, et al.,

Plaintiffs-Appellants,

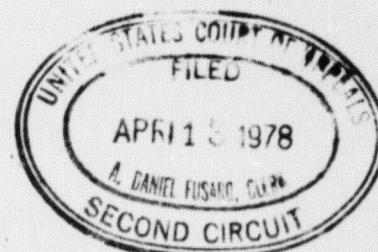
B P/S

- v. -

Docket No. 77-6047

JOSEPH A. CALIFANO, et al.,

Defendants-Appellees.
-----:



PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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KENNETH KOE, et al.,

Plaintiffs-Appellants,

- v. -

Docket No. 77-6047

JOSEPH A. CALIFANO, JR., et al.,

Defendants-Appellees.
-----:

PETITION FOR REHEARING

Plaintiffs-appellants respectfully petition this court for a rehearing pursuant to Rule 40, F.R.A.P. on the decision herein of March 29, 1978.

Rehearing should be granted, and the matter should be remanded to the District Court.

In the alternative, the opinion of this Court should be amended as requested in this petition. The amendments are need so that a proper review of events in the District Court and in this Court can be held by the Supreme Court in a review of a petition for certiorari.

I. THE DECISION OF THE DISTRICT COURT WAS SOLELY
ON THE GROUND OF MOOTNESS. NOTE 9 OF THIS COURT'S
OPINION SHOULD BE AMENDED.

In the memorandum opinion of January 13, 1977, the District Court held solely that the claim for relief was moot. There is no holding, dictum or discussion of exhaustion.

In its prior related opinion of November 20, 1975, the memorandum only denied a temporary restraining order against the federal defendants. The sole grounds of denial were that there was no showing of irreparable harm, and that the SSI discrimination was rational.

" Finally, although not foreclosing relief on the merits at this junction, the possibility of ultimate success is remote. The statute appears to leave no room for the Secretary's discretion in providing SSI payments, once the institution has lost its accreditation, and no longer is eligible for Medicaid payments. See 42 U.S.C. §§ 1395(f)(5); 1396 (d)(9); 1382 (e)(1)(S)." Woe v. Mathews, 75-C-1029, at 5 (E.D.N.Y., Nov. 20, 1975.)

In hearings prior to both opinions, federal defendants exhaustively briefed and argued exhaustion, and in neither opinion is there any holding, dictum or discussion of exhaustion.

If anything, by "not foreclosing relief on the merits at this junction," id., the District Court ruled against exhaustion.

Accordingly, Note 9 of this Court's opinion should be amended to show that the District Court's comments on page 4 of its opinion were directed only to the issue of irreparable harm on a motion for a temporary restraining order, and were not directed to the question of exhaustion.

II. THE SOLE ISSUE RAISED BEFORE BOTH THE DISTRICT COURT AND THIS COURT WAS THE CONSTITUTIONALITY OF THE STATUTE. THEREFORE, COMMENTS ON PAGE 2155, AND IN NOTE 8 SHOULD BE AMENDED.

The initial complaint, admittedly claimed both improper statutory interpretation and unconstitutionality.

By the time of the hearing on the motion to dismiss, however, both the federal defendants and the plaintiffs agreed that there was no issue of statutory interpretation. Neither during the hearing nor in its opinion did the District Court raise the question of statutory interpretation.

All parties and the District Court agreed with the Court's prior holding that:

" The statute appears to leave no room for the Secretary's discretion in providing SSI payments, once the institution has lost its accreditation, and no longer is eligible for Medicaid payments." ibid.

In the argument before this Court, the question of statutory interpretation was not raised by any party nor by the Court.

Accordingly, for purposes of clarifying the issues upon an application for certiorari to the Supreme Court, the opinion should be amended to omit comments - that may be interpreted as holding - as to statutory interpretation.

The withdrawal and abandonment by the plaintiffs of their claim of statutory misinterpretation were recognized and agreed to both by the federal defendants and the District Court prior to the District Court giving its decision.

Accordingly, for purposes of clarifying plaintiffs' proposed petition for certiorari, this Court's comments on page 2155, and in Note 8, should be clarified and amended.

Plaintiffs' timely amendment of their complaint in withdrawing and abandoning the claim of statutory misinterpretation should not be used by this Court as a basis for its decision.

III. THE HOLDING THAT "PLAINTIFFS . . . LODGED NO PROTEST WITH HEW REGARDING ITS THREATENED ACTION PRIOR TO FILING SUIT" SHOULD BE AMENDED.

This Court has held that "plaintiffs . . . lodged no protest with HEW regarding its threatened action prior to filing suit." (pp. 2155-56).

If the District Court had held that exhaustion was an issue, a hearing on exhaustion could have been held. Records of federal defendants could have been subpoenaed to show that adequate protest had been made to qualify for exhaustion where the sole issue is the constitutionality of the statute.

Even without this formal hearing, sufficient protest has been made to qualify for exhaustion.

A. The complaint was dated November 21, 1975, and filed thereafter.

B. On November 18, 1975, Lawrence C. Kolb, M.D., Commissioner of Mental Hygiene of the State of New York - acting as plaintiffs' representative - wrote to the Secretary of HEW, Hon. David Mathews, protesting the SSI cutoff. This letter is annexed hereto as Exhibit "I."

This letter is referred to in 'Exhibit "II" annexed to plaintiffs' brief herein and is part of the record in the District Court.

C. Annexed hereto as Exhibit "II," is a letter from Hon. James B. Cardwell, Commissioner of Social Security, of December 8, 1975 to Max Schneier, Chairman, Federation of Parents Organizations for the New York State Mental Insitutions, Inc.

 This letter by Commissioner Cardwell refers to two prior letters protesting the SSI cutoff written by Mr. Schneier, as plaintiffs' representative, to HEW Secretary Mathews. The two letters by Mr. Schneier were written November 6, 1975 and November 17, 1975.

D. Prior to filing the Koe suit, plaintiffs had moved for a temporary restraining order to stop the SSI cutoffs and named the Secretary of HEW as a defendant. The District Court's decision of plaintiffs motion was on November 20, 1975.

 The protests made on behalf of the plaintiffs as described in paragraphs A,B. and C , supra, constitute adequate exhaustion where the sole issue is a constitutional problem. Mathews v. Eldridge, 424 U.S. 319 (1976).

IV. EVEN IF PLAINTIFFS DID NOT MEET THE ROUTINE REQUIREMENTS OF EXHAUSTION, AS THEY ARE SUI GENERIS, THE REQUIREMENTS OF EXHAUSTION ARE INVIDIOUS IN THIS "CATCH-22" SITUATION.

Even if this Court holds that exhaustion has not been met before deciding the constitutional issue, plaintiffs contend that they are sui generis SSI beneficiaries, and that the statutory exhaustion requirements are invidious as applied to them .

Plaintiffs are inmates of state mental facilities solely because a state judge has held that they are sufficiently mentally ill to require involuntary civil commitment.

Solely because they are socially disadvantaged, the state judge has involuntarily incarcerated them in an unaccredited state facility.

Alone among SSI beneficiaries, they cannot physically move to an accredited facility.

Alone among SSI beneficiaries, even moving in an administrative proceeding to protect their interests exacerbates the very illness that required commitment. (See, Letter of Drs. Henry Brill and Anthony Primeo of November 6, 1975 to Max Schneier, annexed hereto as Exhibit "III"; Also, see Letter of Dr. Lawrence Kolb to HEW Secretary Mathews of November 26, 1975, annexed hereto as Exhibit "IV")

Even more invidious is the Catch-22 position in which the sanist decisions of the federal courts have placed the inmates and their families.

The Supreme Court has held that the socially disadvantaged involuntarily civilly committed state mental institution inmate has ^{Fifth Amendment} no right to federal Medicaid funds to obtain adequate care and treatment. Legion v. Weinberger, 414 U.S. 1058 (1973).

The Supreme Court has held that the socially disadvantaged involuntarily civilly committed state mental institution inmate has no Fourteenth Amendment right to adequate care and treatment. O'Connor v. Donaldson, 422 U.S. 563 (1975).

The state legislatures refuse to provide adequate funds, and involuntarily civilly committed young patients like Woe die two days after admission due to inadequate funding.

If the patients' families take the only means open to them to show to the community that care is inadequate - i.e. cause the state hospital to lose its accreditation - the result is not better care for even one inmate.

The only result is the SSI cutoff of all of the inmate's income.

In its amended opinion, the Court should point out to Congress and the Supreme Court that exhaustion mandates the continuation of the sanist Catch 22 policies of our judicial, legislative and executive branches towards the involuntarily civilly committed inmates.

CONCLUSION

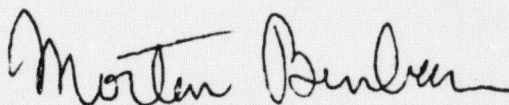
The petition for rehearing should be granted, and the matter remanded to the District Court.

In the alternative, the decision of this Court should be amended as requested in this petition.

The opinion of this Court should also be amended to decide plaintiffs' contention that they are sui generis, and that to remove them from an invidious Catch-22 situation, the requirement of exhaustion is invidious.

Dated: April 11, 1978

Brooklyn, New York



Respectfully submitted,
MORTON BIRNBAUM
Attorney for Plaintiffs-
Appellants
225 Tompkins Avenue
Brooklyn, New York 11216

STATE OF NEW YORK
DEPARTMENT OF MENTAL HYGIENE
ALBANY

LAWRENCE C. KOLB, M.D.
COMMISSIONER

November 18, 1975

Hon. David Mathews
Secretary
Department of Health,
Education and Welfare
Washington, D.C. 20013

Dear Secretary Mathews:

The Pilgrim Psychiatric Center is at this time caring for 1,275 medicaid patients who receive Supplemental Security Income benefits under Title XVI of the Social Security Act. These are patients who, in addition to being eligible for medicaid, have no income of any kind whatsoever and are therefore eligible for a minimal \$25.00 a month benefit which is used for comfort and personal needs.

We have been notified, however, that Pilgrim Psychiatric Center, because of its recent non-accreditation by the Joint Commission on Accreditation of Hospitals, will no longer be considered for participation in the medicaid program as of December 13, 1975. The State of New York has already strongly protested this determination and has requested a review by HEW. Pending a determination of our appeal by HEW, I urge you to intervene to prevent the cutoff of the \$25.00 per month SSI payments to the penniless patients.

I hope that a difference of opinion between the Joint Commission on Accreditation of Hospitals and the State of New York would not cause an interruption in the continued payment of these small amounts to a particularly needy group of our citizens.

Thank you for your thoughtful consideration.

Sincerely yours,

Lawrence C. Kolb, M.D.
Commissioner

cc: Mr. Schneier
Mr. Posner ✓
Mr. Blumberg

Exhibit "I"



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND 21235

REFER TO:
ISS-1

December 8 1975

OFFICE OF THE COMMISSIONER

Mr. Max Schneier, Chairman
Federation of Parents Organizations for
the New York State Mental Institutions, Inc.
162 West 56th Street, Suite 507
New York, New York 10019

Dear Mr. Schneier:

This is in further response to your letter of November 6 concerning the supplemental security income (SSI) program. The Secretary also has asked me to answer your Mailgram of November 17 on the same subject.

I can understand your feelings about the suspension of the \$25 monthly SSI payments to some 1,300 patients at Pilgrim Psychiatric Center. However, section 1611(e)(1) of title XVI of the Social Security Act clearly prohibits the payment of SSI benefits to an individual in a public institution unless the institution receives payments with respect to the individual under a State plan approved under title XIX (Medicaid). Since Federal Medicaid funding for Pilgrim Psychiatric Center will cease effective December 13, 1975, after that date we will have no legal basis for continuing SSI payments to patients in the Center. As of January 1976, these individuals will be in the same position under the SSI law as other individuals in public institutions which are ineligible to receive Medicaid payments.

✓ You will be interested to know that not more than 15 of the suspension notices were mailed directly to patients at Pilgrim Psychiatric Center. These are patients who have been medically determined to be capable of handling their own funds. All other notices were sent to appropriate representative payees.

I hope this information will help to clarify our position. If I can be of further assistance, please let me know.

Sincerely yours,

James B. Cardwell
Commissioner of Social Security

Exhibit "II"



State of New York
Department of Mental Hygiene

ANTHONY M. PRIMELO, M.D.
Director

PILGRIM PSYCHIATRIC CENTER

West Brentwood, Long Island, N. Y. 11717

Telephone No. 516-231-8000

*Attached
to
We
in
S.E.*

November 6, 1975

Mr. Max Schneider
Chairman
Federation of Parents Organization
162 W. 56 Street Suite 507
New York, N. Y. 10009

Dear Mr. Schneider:

This is in response to your inquiry about the potential effect of the loss of S.S.I. allowances for patients at Pilgrim.

In our professional judgment the receipt of such a letter by our patients and also the resulting loss of these funds will be demoralizing and could cause severe emotional distress to a number of persons who have no other source of personal income. We would deeply regret this development.

Very truly yours,

Brill
HENRY BRILL, M.D.
Regional Director

Anthony M. Primele
ANTHONY M. PRIMELO, M.D.
Director

AMP:lg

Exhibit "III"

STATE OF NEW YORK
DEPARTMENT OF MENTAL HYGIENE
ALBANY

LAWRENCE C. KOLB, M.D.
COMMISSIONER

November 26, 1975

Hon. David Mathews
Secretary
Department of Health,
Education and Welfare
Washington, D.C. 20013

Dear Secretary Mathews:

On November 18, 1975 I wrote to you appealing that your office intervene and prevent the cutoff of the \$25.00 per month SSI payments to the penniless patients at Pilgrim Psychiatric Center. As I explained this cutoff would follow the recent non-accreditation of that Center by the Joint Commission on Accreditation of Hospitals which led to your Department informing us of the withdrawal of federal support for this purpose and other purposes in the Center.

My current letter elaborates upon that statement of appeal. As a long-time specialist in the field of psychiatry and as one who has had under treatment many, many individuals over the years and as their current representative in this office, it is my opinion that the withdrawal of this funding for the 1275 medicaid patients will indeed lead to a serious and, in some instances, irreparable harm to them. My reasons for making this statement are that the withdrawal will be seen as still further betrayal of the society in which they live and will lead to the mounting arousal of the very emotional states and their psychopathology which have required these individuals to seek or be placed for care in a psychiatric facility.

I am certain that in your office your goals are similar to those of us in this Department, and in a society as generous as ours has been and as affluent has it happens to be, it would not be the wish of the Secretary's Office to sustain a decision that would further cause distress and pathology in so many defenseless persons.

Sincerely,

Lawrence C. Kolb, M.D.
Commissioner

LCK:sab
cc: Mr. Schneider ✓
Mr. Posner

Exhibit "IV"

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

MORTON BIRNBAUM, being duly sworn, deposes and says that he is the attorney for the plaintiffs-appellants; that on the 11th day of April, 1978, he sent a copy of the annexed Petition for Rehearing together with the Exhibits annexed thereto to David G. Trager, Esq., Federal Building, 225 Cadman Plaza East, Brooklyn, New York 11201 and to Louis G. Lefkowitz, Esq., 2 World Trade Center, New York, New York, by first class mail in a post-paid sealed envelope.

Morton Birnbaum

Sworn to before me this
11th Day of April, 1978

Sylvia Rosen

SYLVIA ROSEN
Notary Public, State of New York
No. 91-8647015
Qualified in New York County
Commission Expires March 30, 1980

